BH

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

MAY 20 2003

File: WAC 02 095 53356 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

identifying data deleted to prevent clearly unwarranted invasion

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Nevada corporation that seeks to employ the beneficiary as its president and chief executive officer (CEO). The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition on the ground that the petitioner does not have the ability to pay the proffered wage of $75,000 per year.

On appeal, the petitioner submits a statement and additional evidence. The petitioner states that it paid the beneficiary's $75,000 yearly salary in the past and has the ability to pay his salary in the future.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

> (1) Priority Workers. - - Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. - - An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a

statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of UCM SRL of Italy; (2) is a creative media and integrated communications company; and (3) employs the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A).

The issue to be discussed in this proceeding is whether the petitioner, at the time of filing the petition, had the ability to pay the proffered wage of $75,000 per year.

Pursuant to 8 C.F.R. § 204.5(g)(2):

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . .

At the time of filing the I-140 petition with the California Service Center on January 24, 2002, the petitioner did not submit any evidence of its financial position, including copies of its federal income tax returns. Therefore, on March 18, 2002, the director requested additional evidence regarding the petitioner's ability to pay the proffered wage, which included:

- IRS Computer Tax Records: Submit the *latest* original computer printouts from the Internal Revenue Service (IRS), date stamped by the IRS, of tax returns filed with the IRS by the U.S. company. (Emphasis in original.)

- Federal Income Taxes: Provide signed and certified copies of the U.S. company's Federal income taxes, to include Forms 1120, 2220, 4526, and 5472 as appropriate, *from the date the U.S. company was established to the present*. (Emphasis in original.)

- State Income Taxes: Provide the latest signed and certified copies of the U.S. company's State income taxes.

In response, the petitioner submitted copies of its federal income tax returns (Form 1120-A) for the years 1999, 2000 and

2001. According to the petitioner these were the only years during which it was operational. Regarding the computer-generated IRS tax records, the petitioner stated that it had requested, but had not yet received, these documents from the IRS. Regarding its state income tax returns, the petitioner informed the director that, because the petitioner is a Nevada corporation, it is not subject to California State taxes and is not required to file taxes in Nevada.

Information gleaned from the petitioner's federal income tax returns caused the director to deny the petition for the petitioner's inability to pay the proffered wage. According to the director: (1) the 1999 Form 1120-A showed a net loss of $22,428, with no wages or salaries paid, and no compensation to officers; (2) the 2000 Form 1120-A showed a net income of $15,945, with no wages or salaries paid, and no compensation to officers; and (3) the 2001 Form 1120-A showed a net loss of $1,763, with no wages or salaries paid, and no compensation to officers. The director concluded from this information that the petitioner did not in the past, and could not in the future, pay the $75,000 yearly wage to the beneficiary.

On appeal, the petitioner states that the director incorrectly interpreted information on the federal income tax returns when denying the petition. According to the petitioner, its 1999, 2000 and 2001 federal income tax returns show "subcontractor fees" of $54,619, $48,238, and $51,752 respectively. The petitioner states that these fees were paid to the beneficiary as an officer of the corporation. In support of this claim, the petitioner submits copies of Form 1099-MISC for the 1999, 2000, and 2001 years, which show that the beneficiary received from the petitioner $48,000 during each year. Additionally, the petitioner states that the remaining $27,000 of the beneficiary's yearly salary was paid by issuing to the beneficiary shares of the petitioner's stock at the end of each calendar year. To support this assertion, the petitioner submits copies of stock certificate numbers two through four, each of which shows that the beneficiary has in his name 27,000 shares of the petitioner's stock.

Bureau regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The I-140 petition was filed with the California Service Center on January 24, 2002 and, therefore, the petitioner must establish that it had the ability to pay the proffered wage as of this date. Accordingly, the petitioner's financial position during the 2001 calendar year is relevant to this proceeding.

The petitioner has established that it paid the beneficiary $48,000 during the 2001 calendar year, as evidenced by the 2001 Form 1099-MISC. However, the petitioner does not present

credible evidence of an additional payment to the beneficiary of $27,000.

The petitioner claims that it paid the beneficiary the balance of his wages by issuing to him shares of its stock. In support of this claim, the petitioner submits copies of three stock certificates numbered two through four, each of which is for 27,000 shares of stock. Stock certificate number two was issued on December 28, 1999; stock certificate number three was issued on December 27, 2000; and stock certificate number four was issued on December 22, 2001. According to each certificate, however, the petitioner only authorized the issuance of 25,000 shares of its stock at a par value of $1.00. Stock certificate number one, which was submitted with the initial filling of the petition, indicates that the petitioner's alleged parent company, UCM SRL, holds all 25,000 shares.

The petitioner fails to present any documentary evidence, such as the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings, to show that it was authorized to issue more than 25,000 shares of stock as payment to the beneficiary for services rendered. Without documentary evidence to show that stock certificate numbers two through four were validly issued, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, the director's decision to deny the petition will not be disturbed.

Beyond the decision of the director, the record fails to establish that: (1) a qualifying relationship exists between the petitioner and the Italian entity, UCM SRL; (2) the proffered position is in a managerial or executive capacity; (3) the petitioner had been doing business for at least one year at the time the petition was filed; and (4) the beneficiary was employed by a qualifying foreign entity for at least one year in the three years immediately preceding the beneficiary's entry into the United States as a nonimmigrant.

Regarding the relationship between the petitioner and the Italian entity, the submission of stock certificate numbers two through four on appeal raises questions regarding the ownership and control of the petitioner. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 595 (Comm. 1988) (in nonimmigrant visa proceedings). At the time of filing the petition on January 24, 2002, the petitioner submitted only stock certificate number one, which was allegedly issued on December 18, 1998. Although stock certificate numbers two through four were all issued prior to the submission of the I-140 petition, the petitioner failed to present this evidence to the Bureau.

The petitioner's failure to submit all four of its stock certificates, as well as an accompanying corporate stock ledger, leads the Bureau to conclude either that: (1) stock certificate numbers two through four were issued only in response to the director's denial of the petition and are, therefore, invalid; or (2) the petitioner willfully withheld evidence from the Bureau so that it could establish a qualifying relationship with the Italian entity, UCM SRL. The Bureau notes that, if stock certificate numbers two through four were validly issued, the beneficiary, [redacted] would hold 81,000 shares of the petitioner's stock, with UCM SRL holding only 25,000 shares. In this scenario, a qualifying relationship between the petitioner and UCM SRL would not exist because there is no evidence that [redacted] owns and controls UCM SRL.

Regarding whether the proffered position is in a managerial or executive capacity, the petitioner has not furnished a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). At the time of filing the petition in January 2002, the petitioner submitted only a proposed business plan of its operations, which listed the names, job titles and job duties of the employees it expected to hire starting in July 2002. Nowhere in the record is there a comprehensive description of the job duties that the beneficiary would execute on a daily basis as the president and CEO. As stated previously, a petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's submission of evidence relating to its anticipated staffing levels and organizational hierarchy fails to establish that, at the time of filing the petition, the reasonable needs of the petitioner, in light of its overall purpose and stage of development, required the services of an individual in a managerial or executive capacity. *See* Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C).

Regarding the petitioner's business operations, 8 C.F.R. § 204.5(j)(3)(i)(D) requires a petitioner to establish that it had been doing business for at least one year at the time the petition was filed. The term *doing business* is defined as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." 8 C.F.R. § 204.5(j)(2). Although the petitioner's 2001 income tax returns show that it had gross receipts/sales of $103,471, the petitioner did not show from where this income was derived. The petitioner did not submit copies of invoices or any other documentary evidence to show that this income was derived from regularly, systematically and continuously providing its consulting services; this income could have derived from consulting on just one or two occasions during the year.

Finally, as the petitioner has not established the existence of a qualifying relationship between it and the Italian entity, the beneficiary cannot meet the requirement of 8 C.F.R § 204.5(j)(3)(i)(B), which states that the beneficiary must have been employed by the qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status.

As the appeal is dismissed on the issue of the petitioner's inability to pay the beneficiary's salary of $75,000 per year, these additional issues, which were not raised by the director but are critical elements to establishing eligibility for this immigrant visa classification, will not be discussed further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.